



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20461

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Gerald L. McMillian

DEC 15 2008

Proctorville, OH 45669

RE: MUR 5664
International Union of Painters and
Allied Trades District Council 53
Clarence E. Mitchell, Sr.

Dear Mr. McMillian:

This is in reference to the complaint you filed with the Federal Election Commission on June 13, 2005, concerning the International Union of Painters and Allied Trades District Council 53 ("District Council 53") and Clarence E. Mitchell, Sr. Based on that complaint, on September 19, 2006, the Commission found that there was reason to believe District Council 53 and Mr. Mitchell violated 2 U.S.C. § 441b(a), a provision of the Federal Election Campaign Act of 1971, as amended, and instituted an investigation of this matter. However, after considering the circumstances of this matter, the Commission determined to take no further action as to District Council 53 and Mr. Mitchell, and closed the file in this matter on November 18, 2008. The General Counsel's Report #2 explaining the Commission's decision is enclosed.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003).

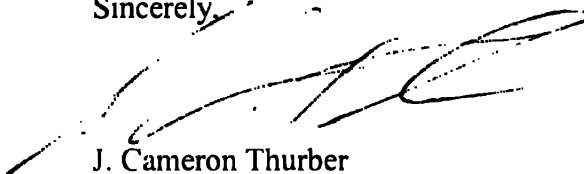
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The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. *See* 2 U.S.C. § 437g(a)(8).

If you have any questions, please contact me at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Cameron Thurber", written over a horizontal line.

J. Cameron Thurber
Attorney

Enclosure
General Counsel's Report #2

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1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of)
4)
5 International Union of Painters and Allied Trades) MUR 5664
6 District Council 53)
7 Clarence E. Mitchell, Sr.)
8

9 **GENERAL COUNSEL'S REPORT #2**

10 **I. ACTIONS RECOMMENDED**

11 Take no further action as to the International Union of Painters and Allied Trades
12 ("IUPAT") District Council 53 and Clarence E. Mitchell, Sr., and close the file.

13 **II. BACKGROUND**

14 Based on a complaint filed by a former long-time employee, the Commission previously
15 found reason to believe that IUPAT District 53 and its Business Manager/Financial Secretary,
16 Clarence E. Mitchell, Sr., violated the Act by requiring District 53 employees to conduct political
17 activities during paid working hours and on nights and weekends. The complainant also alleged he
18 suffered retaliation for filing his complaint with the Commission and resigned as a result.

19 At the time of the reason to believe findings, the Commission had in its possession
20 eleven sworn affidavits filed in response to the complaint, two from District 53's Business
21 Manager and Assistant Business Manager, and nine others from subordinate employees
22 reporting to these managers, that all disputed complainant's allegations. While the number
23 of those affidavits cast doubt on complainant's allegations, the very nature of those
24 allegations – coercion by top managers – and the fact that all the sworn statements had been
25 produced by either those same managers or employees who reported directly to them,
26 warranted an investigation. This was particularly so where the complainant had also
27 alleged reprisals by his employer for filing his complaint with the Commission.

After an investigation, we have determined that there is insufficient evidence to warrant continuing the investigation or recommending any further action as to Respondents. Therefore, we recommend that the Commission take no further action and close the case as to all Respondents.

III. FACTUAL SUMMARY

Complainant Gerald McMillian alleged that District 53 made, and its business manager, Clarence E. Mitchell, Sr., consented to the making of, prohibited in-kind contributions from a labor organization to the 2004 Kerry/Edwards presidential campaign. According to McMillian, Mitchell instructed District 53 employees to participate in activities in support of Kerry/Edwards or in opposition to Bush/Cheney, including attending political rallies, engaging in precinct walks to register voters and encourage support of Kerry/Edwards, and putting up campaign signs. McMillian also alleged that once he told Mitchell that he planned to file a complaint with the Commission, he was charged with and sanctioned for misconduct by the District, removed from an official position, received threats, and eventually felt forced to resign his employment.

In response to the complaint, District 53 submitted affidavits from eleven District employees, including Mitchell, which specifically contradicted McMillian's allegations. The affidavits state that while employees of District 53 took part in political activities, and some affiants received information about "upcoming political events," they understood that any participation was voluntary and to be done on personal time with their own vehicles. Several of the affidavits flatly assert that McMillian's allegations are "false."

III. RESULTS OF INVESTIGATION

At the time of the events in question, District 53 was a state-level subdivision of IUPAT.¹ District 53 was further subdivided into a number of local unions, each of which elected or had appointed one member every three years to be the local union's business representative to work full-time at District headquarters as a paid District employee. The nine business representatives in 2004, who compose the group that complainant alleged were directed to participate in political activity, all reported to Mitchell through the assistant business manager, Richard Hackney.

The investigation was hampered both by the lack of documentation and by conflicting and possibly unreliable witness statements. The Commission issued a document subpoena to District 53; we hoped to use the subpoenaed documents to determine whether and when union employees engaged in political activity. However, while District 53 claims it produced all relevant records still in its possession, its production failed to include a comprehensive set of personnel, work, and time records called for by the subpoena.² Moreover, we were told by several witnesses during the investigation that although each of the business representatives were paid for 40 hours, and were generally expected to be in the District 53 office during certain "core hours," they routinely worked over 40 hours, were often on the road, and were expected to be "on call"

¹ While encompassing all of West Virginia, District 53 also encompasses parts of Ohio, Maryland, Virginia and Kentucky. Since the complainant's resignation in 2005, his former local chapter was merged into another local.

² For example, the subpoena to District 53 demanded "copies of all weekly and monthly work reports, time sheets, time cards and related documents" for "all employees of District Council 53." However, while District 53 produced complainant McMillian's weekly work reports, it did not produce weekly work reports for other employees. The only explanation District 53 gave for this lack of employee records was that it specifically retained McMillian's records because of the complaints he filed with the Commission and the National Labor Relations Board ("NLRB").

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1 at all times, including nights and weekends. This loose description of regular working
2 hours, unaccompanied by verifiable documentation, made it difficult to pin down when and
3 if employees participated in political activities during paid union time, or if they later made
4 up such time, as some claimed they had. During the investigation, witnesses attributed the
5 dearth of documents to informality in conducting internal business, lack of document
6 retention policies and poor recordkeeping; Mitchell denied, and we could not otherwise
7 confirm, an allegation that he had destroyed some records prior to his retirement in 2006.

8 As a result of the lack of documentary evidence, we had to rely heavily on
9 interviews and depositions. Of the nine business representatives in 2004, we interviewed
10 six—the complainant, Ted Hart, Mike Pennington, Dan Rowland, Gary Strobe and Jerry
11 Huffman—and deposed one, Denver Abicht. We also interviewed former apprenticeship
12 instructor Homer Williamson, and we deposed former business manager Mitchell; Richard
13 Hackney, the current business manager who was assistant business manager in 2004; Billy
14 Ray Bradley, Director of Civic Participation for the 2004 general election; and Daniel
15 Poling, Political Director for District 53 in 2004. However, it was difficult to evaluate the
16 veracity, credibility and reliability of those interviewed and deposed due to conflicting
17 stories, accusations and denials, alleged threats and recriminations,³ and possible biases.⁴
18 One individual, Ted Hart, who began cooperating with us after he lost his job, see footnote

³ McMillian claimed that two District 53 employees had threatened him with bodily harm.

⁴ Besides McMillian, Hart, Strobe and Huffman also left District 53 under acrimonious circumstances. Hart claimed he was improperly terminated, has accused District 53 management of forging his signature on a letter of resignation and has retained counsel concerning this allegation. Hackney accused former business representatives Jerry Huffman and Gary Strobe, both of whom abruptly left District 53 to go work for another union, of "raiding" District 53's membership for the other union.

1 4, recanted several paragraphs of his affidavit that was submitted with the response, and
2 stated in a subsequent affidavit that Mitchell had pressured him to sign the first affidavit
3 that denied complainant's allegations. Our investigation, however, raised questions as to
4 the reliability of Hart's revised testimony, and we were not able to corroborate this
5 accusation.⁵

6 With this background, we set forth below the results of our investigation.

7 **A. In-kind Contributions**

8 We could not establish that District 53 made in-kind contributions to the
9 Kerry/Edwards campaign as a result of managers directing employees to engage in political
10 activities either during paid union time or on their personal time. Although some
11 employees told us that they participated in political activities on paid union time, and did
12 not make up the time, which would constitute an impermissible in-kind contribution, this
13 conduct purportedly was contrary to union policy, and we could not establish that their
14 supervisors were aware of the failures to adhere to the policy.

15 The supervisors, Mitchell and Hackney, testified that they never directed any
16 District 53 employee to participate in political activities, and the employees we deposed
17 confirmed that they were never expressly ordered or directed to participate in such
18 activities either on or off union time. Implying that there was implicit pressure, McMillian,
19 the complainant, claimed that employees would "catch flak" if they did not participate in

⁵ According to Hart, on the day he signed the affidavit, he, Pennington, Rowland, Abicht, Poling, Huffman, Strobe and Hackney were in a conference room at the offices of District 53's counsel, and Mitchell said "Any District 53 member who does not sign this affidavit will not be a District Council employee tomorrow." In his deposition, Mitchell denied making the statement, and Abicht, Poling and Hackney testified they never heard Mitchell make it. Pennington and Roland likewise did not hear the statement, though each claimed he had heard something about it third-hand. District 53 submitted invoices from its counsel containing billable hour information that was inconsistent with Hart's recollection of the events surrounding the signing of the affidavits and the alleged statement.

1 political activities, and business representative Strobe told us that employees would be sent
2 out of town on assignment or given extra work for failure to participate. However,
3 Mitchell, Hackney and Poling each testified they had never retaliated or threatened
4 retaliation against employees for not participating in political activities. Business
5 representative Abicht testified he had no knowledge of actual or threatened retaliation. He
6 described one instance in which he declined to attend a rally, and testified that he suffered
7 no repercussions. Although some employees felt there was a tacit understanding that
8 political participation was part of the job or that they had to participate in certain events
9 even though they did not want to, there was insufficient evidence to establish that
10 employees were directed to do so or suffered job reprisals if they failed to do so.

11 Volunteers may only participate in public political activities during paid working
12 hours if they compensate their employer for that time; otherwise, such participation
13 constitutes an in-kind contribution of personal services. 11 C.F.R. § 100.54(a). Mitchell
14 testified that he did not allow his employees to participate in political activities on District
15 53 time unless they compensated the union by making the time up. However, in the
16 instance of the one rally during 2004 that a substantial number of employees attended
17 during working hours, Mitchell apparently did not strictly enforce this policy.

18 That rally, in support of Kerry/Edwards, occurred in Beckley, West Virginia, on
19 July 9, 2004. In an affidavit, Williamson stated that he attended this rally during normal
20 working hours but was never required to, and never did, make up the time. He further
21 averred that eight to ten other employees attended, and to his knowledge no one else had to
22 make up that time, either. In his interview, Huffman stated he attended the Beckley rally,
23 and that he did not make up the time. Strobe also said in his interview that he attended the

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1 rally and did not think he made up the time. However, Mitchell, Hackney, Poling, Abicht
2 and Rowland stated that they made up the time they spent at the rally by working extra
3 hours or taking leave. Abicht testified, "I know I personally asked for a personal day off
4 that day. I can't tell you about the rest of them, but I would say they probably all did too
5 because we pretty much knew our rights and wrongs."⁶ As noted previously, we did not
6 receive documentation that might have verified who did or did not make up the time spent
7 at the Beckley rally. Hackney testified he did not follow up with employees who attended
8 the rally but stated "they were supposed to have gone back to work" and make up the time,
9 and Mitchell testified he would "not approve" of an employee not making up any work
10 time spent on political activities.

11 In his affidavit, Williamson also stated that he attended one other rally during
12 working hours in Huntington, West Virginia, on Thursday, September 16, 2004. He further
13 stated he found out about the rally on his own and went by himself, and that McMillian and
14 Pennington were also in attendance. He said he was there for about three hours and was
15 not required to make up the time. Hart also told us that he went to one other rally during
16 work hours and Strobe stated that he had attended other political activities during work
17 hours, but did not, and was never told to, make up the time.⁷

⁶ McMillian filed an unfair labor charge with the NLRB, and Kenneth Byrd, a District 53 business representative, whom we did not speak to, submitted an affidavit to the NLRB that District 53 provided to us. In the affidavit, Byrd stated, "The attendance at rallies was done during working hours and I was on the clock and paid by the Union. I was not required to take personal or vacation time on these occasions. However, I worked evenings and weekends to make up for the time I spent at the rallies during working time."

⁷ Some employees stated they also performed certain tasks at rallies, including security and set-up, but it appears most of these duties were performed as off-duty volunteers, as the employees generally said these activities were done at night, on weekends or that the time was made up.

1 Hart also told us he went on several precinct walks (walks where union members go
2 door-to-door to union households to register voters and discuss candidates and issues) with
3 Abicht during working hours without having to make up the time. In his deposition,
4 however, Abicht denied that was the case. According to Abicht, he only went on one
5 precinct walk during work hours, he was accompanied by Political Director Dan Poling,
6 and he made up the time."⁸ In the absence of District 53 records, we could not verify
7 either version of events.

8 McMillian also alleged that District 53 employees were "required to do precinct
9 walks during the evenings and weekends." Several employees stated that they voluntarily
10 participated in such walks, during which they handed out to union households voter guides
11 supplied by the AFL-CIO (of which IUPAT was a member) that listed the candidates'
12 stands on the issues, which constituted legal behavior under the Act. Abicht testified that
13 he did not feel, or know of other District 53 employees who felt, that they had to engage in

⁸ Hart also alleged that during his precinct walks with Abicht, they advocated for Kerry/Edwards when speaking both to union households, which would be permissible, and to other members of the public, beyond the restricted class, which would not. Abicht, however, testified that on any precinct walks he took, he would go only to designated union households, and if he mistakenly went to a non-union household, he'd leave. Hart also said that on one particular walk in Toronto, Ohio, on or about September 27, 2004, when he was accompanied by Civic Participation Director Bradley, Mitchell told him to "hit every house on the block even if only one union member lived on the street." Hart provided a "Local Union No. 438 B.A.'s Report" which stated that on September 27, 2004, "Myself, Hack and Ray were assigned Toronto and I got the hard job (chauffeur). It went well and we had a good time." Bradley, however, testified he only went to union households on this trip and the B.A. Report and Hackney's testimony conflict with Hart's affidavit concerning other facts surrounding the trip to the area. In his deposition, Mitchell denied telling Hart that walks should include non-union households. Finally, Hart claimed that Political Director Poling assigned him as part of his job duties to a polling location on election day to hand out Kerry/Edwards literature. We could find no corroborating information regarding this claim, and Poling testified he could not recall anything about the alleged incident.

1 these activities as part of their jobs, and that neither Mitchell nor Hackney ever ordered
2 anyone to do a precinct walk.⁹

3 McMillian further claimed he spent approximately "60 hours on the clock" putting
4 up signs that said "IUPAT for Kerry" on public rights-of-way. Hart also stated he spent a
5 few paid working hours over two to three days placing IUPAT signs advocating
6 Kerry/Edwards on public roadways at Hackney's direction, and was sometimes joined by
7 Abicht; he said Abicht "might be the only one willing to tell the truth" about these facts.
8 However, in their depositions, Abicht denied the allegation and Hackney denied telling
9 Hart to put up any signs. Abicht, Rowland and Huffman stated that they only put up signs
10 as volunteers during nights and weekends. Mitchell testified that if McMillian and Hart put
11 up signs during work hours, it may have been done on their own initiative.¹⁰

⁹ McMillian also alleged that the District 53 made in-kind contributions through the use of District 53 vehicles to provide transportation to political activities. Our investigation revealed that while employees occasionally used union vehicles to travel to political activities in which they participated, they often transacted union business while on the road and were allowed to use the vehicles for limited personal use so long as they paid any taxes for such use at the end of the year. It would be difficult, if not impossible, to separate out work-related travel costs from those for political activities and, even if these costs could be separated, the travel costs for political activities would likely be very low.

¹⁰ In his complaint, McMillian claimed that employees were told never to list participation in political activities on their weekly work reports, or else the reports would be rejected, and instead to characterize them as "educating our membership." However, to show that work reports mentioning political activity were not rejected, District 53 provided with its response four of McMillian's weekly reports referencing his participation in political activities; as noted in footnote 2, we did not receive a full set of the other business representatives' work reports. Moreover, Mitchell and all the other deponents testified that Mitchell never told anyone not to put political activity on work reports, or that their work reports would be rejected if they mentioned political activity or did not use "educating membership" in lieu of political activity. Mitchell, Hackney and Abicht testified that the term "educating membership," to the extent it was used, was intended to apply to activity where the employees were "educating" other union members about the candidates and the issues, rather than to hide political activity. Additionally, some business representatives told us that they were supposed to record their time participating in political activities on a separate monthly political report form created by Political Director Dan Poling. These reports consisted of three pages - two pages to detail voter registration of union members and one with numbered spaces for filling in both volunteer and permissible union activities other than voter registration.

B. Alleged Retaliation for Filing a Commission Complaint

McMillian alleged that he was twice brought up on union "charges," resulting in two "trials" and subsequent sanctions, for violating union rules and essentially pressured to resign as a result of his filing of the complaint in this matter. He stated he resigned after being removed as a trustee from the Health and Welfare Committee and being told he would have to travel out-of-town on a business trip that he felt was a "trap" since he would be travelling with other employees who had threatened to "whip my Ass [sic]" and "kick my Ass [sic]." Supplemental Complaint at 2.

We took McMillian's allegation seriously but did not find sufficient evidence to show that he suffered retaliation as a result of filing his complaint with the Commission. Rather, the information we obtained indicated that the union charges brought against McMillian were related to his alleged offensive and violent conduct at a union conference while intoxicated, creating dissention during a union meeting and for violating rules regarding accepting a job over other union members on a hiring list. While it is difficult to discern motive and pretext, it appears that there were grounds unrelated to McMillian's filing of the complaint that explain the disciplinary action taken as to him. Concerning the out-of-town assignment that was allegedly "a trap," and that prompted McMillian's resignation, Mitchell testified he was sending McMillian because he was the "most qualified" and "most applicable" person to do the job of organizing in that location, and that "[e]verybody took their turn organizing in different areas."

McMillian made similar charges about reprisals and forced resignation in a state unemployment action and in an NLRB complaint. District 53 provided a report by the state unemployment commission denying McMillian unemployment benefits because he "left

1 work voluntarily without good cause involving fault on the part of the employer." We
2 spoke with a representative of the NLRB who told us that the NLRB found an insufficient
3 basis for proceeding with McMillian's complaint.

4 C. Conclusion

5 In sum, we concluded that there were likely violations of the Act consisting mainly
6 of individuals failing to make up limited amounts of time they spent on political activities
7 during union time, purportedly in contravention of the union's policy that such time had to
8 be made up. We did not uncover reliable evidence that these violations were systematic or
9 that District 53 supervisors directed or required employees to engage in political activity
10 either on or off union time, or retaliated or threatened retaliation if employees declined to
11 engage in such activities. Not only did the violations appear to be relatively limited, we
12 could not prove that District 53 management knew of them, and we do not believe that
13 additional investigation would materially change the situation. Therefore, it appears that it
14 would not be a good use of Commission resources to proceed further as to any of the
15 Respondents.¹¹ As to complainant's claim that he was retaliated against by District 53 for
16 filing his complaint with the Commission, while we cannot foreclose the possibility of
17 animosity toward McMillian for this action, neither can we prove that it caused District 53
18 to sanction him or led to his resignation.

¹¹ Near the conclusion of our investigation, Huffman claimed that he and other employees were pressured in 2007 to contribute to the "Chairman's Club," which is a designated level of contributions made to IUPAT's PAC. Huffman stated that Hackney once said, "By God, if they don't give the money they won't be working here." In early 2007, Huffman said he was told by Poling to pressure Strobe and another District 53 employee into making \$250 contributions to the Chairman's Club. Strobe claimed he contributed in February 2007 because Huffman warned him he would get fired if he did not do so. In their depositions, both Poling and Hackney deny these allegations. Although this is a serious accusation, it is entirely unrelated to the time-period and the allegations in the complaint. Accordingly, we recommend not pursuing these allegations any further.

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Accordingly, we recommend that the Commission take no further action and close the file as to the International Union of Painters and Allied Trades District Council 53 and Clarence E. Mitchell, Sr.

V. RECOMMENDATIONS


1. Take no further action as to the International Union of Painters and Allied Trades District Council 53 and Clarence E. Mitchell, Sr.;
2. Close the file; and
3. Approve the appropriate letters.

Thomasenia P. Duncan
General Counsel


Date

4/4/08

BY:


Mark D. Shonkwiler
Acting Deputy Associate General
Counsel For Enforcement


Susan L. Lebeaux
Assistant General Counsel


J. Cameron Thurber
Attorney